"HARD" TOOLS FOR CONTROLLING DISCOVERY BURDENS IN ARBITRATION



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Arbitration (and American arbitration in particular)[1] has received increasing criticism,[2] based largely on the contention that arbitration too closely resembles conventional litigation, producing undue burden and costs.[3] Chief among the criticisms is the view that discovery (particularly discovery of electronic information, or "ediscovery") is largely uncontrolled, undermining efforts to promote arbitration as a speedy and economical alternative to litigation.[4] Solutions, in response to the criticisms, abound. One popular view is that better education of neutrals about the demands of modern discovery, and entreaties to neutrals to manage discovery processes more closely, can solve this problem,[5] through a system where arbitrators work with the parties to "right-size" the proceedings, and closely monitor developments in the case, to avoid a "runaway" process,[6] sometimes referred to as "muscular arbitration."[7] This approach largely mirrors the "active case manager" model recommended for judges facing similar problems of discovery control.[8]

Central to the active case management approach is a concern for "proportionality," i.e., that the scope and form of discovery should be "proportional to the stakes and issues involved in the case[.]"[9] That proportionality concern is already a central focus of arbitration-sponsoring institutions.[10] Yet, budgeting for ediscovery projects is notoriously elusive,[11] and the ability of parties to determine, in advance, precisely what information they have that may be relevant to the dispute means that a "case manager" (arbitrator or judge) may have difficulty doing much more than encouraging parties to consider their obligation to engage in "proportionate" discovery,[12] and (when and if a party complains about the burdens of discovery) adopting specific case management techniques to control undue burdens.[13] Proportionality, moreover, is a rather old, but ill-defined concept, which has often eluded parties in the heat of battle.[14]

The admonition that arbitrators should pay attention to proportionality is generally "soft" on the parties (and their counsel), meaning that the case manager arbitrator does not place any immediate limitations on discovery,[15] until the parties have had a chance to "meet and confer," and the arbitrator generally does not constrain the discovery process unless one of the parties specifically requests assistance.[16] By contrast, there are "hard" tools for limiting discovery, which can be imposed, from the outset of a case, without extensive input from the parties, and on a basis that does not depend on a detailed assessment of proportionality issues. In the arbitration context, these hard tools may be particularly useful. This Article briefly outlines some of the "hard" tools for discovery management, and suggests some reasons why such tools may be useful in arbitration.

The essential notion of these "hard" tools is that parties may choose, in their arbitration clause, or by virtue of the choice of arbitration-sponsoring organization, or at the outset of the arbitration process itself, to focus and streamline discovery processes, through the adoption of one or more of these tools. The tools thus become a default framework that will apply, unless the parties thereafter agree to modifications, or the arbitrator finds good cause for a change. The use of such tools could increase the predictability of discovery obligations in arbitration, and reduce disputes about the application of proportionality rules.

DIFFERENTIATED CASE MANAGEMENT

Many court systems (especially in the state courts) have adopted forms of "differentiated case management," wherein cases are assigned "tracks" (based

largely on the size of the claims in dispute).[17] These tracks, in turn, determine the presumptive scope of discovery (often, by limiting the number of document requests, the period for discovery, or the availability of other discovery processes, such as depositions). In the arbitration context, the Institute for Conflict Prevention and Resolution ("CPR") issued its Protocol on Disclosure of Documents & Presentation of Witnesses in Commercial Arbitration, which employs differentiated case management.[18] The CPR Protocol offers an array of "modes of disclosure," ranging from the most basic (no disclosure of documents, other than disclosure, prior to the evidentiary hearings, of documents that each side will present in support of its case), through three more modes, with increasingly expanded discovery in each mode.[19] This concept (categorization of cases, and application of different discovery rules to different sizes of cases) commonly appears in other arbitration systems.[20]

A differentiated case management system could be combined with many of the other "hard" tools for discovery control listed below (that is, once a case has been categorized, an array of automatic discovery limitations would apply).[21] The categorization process, moreover, need not automatically depend on the monetary size of claims. Many systems allow parties to "opt in" to a particular category, to object to a categorization (and reassign the case), and to submit information to administrators regarding the size and complexity of the case that is not confined to the dollar value of the claims at issue.[22]

DISCOVERY DEADLINES

According to the now-famous "Parkinson's Law," work generally "expands so as to fill the time available for its completion."[23] The corollary to that "law," that the more time a project takes, the more it costs, is also true.[24] That adage seems particularly true in the context of discovery.[25] Setting reasonable, but short, deadlines for the completion of discovery, and holding firm to those deadlines (in the absence of compelling need) may be one of the most effective methods of focusing the parties on the discovery processes that actually need to be undertaken.[26] Time limits for discovery may be automatically linked to the size of the case; presumptively, a smaller case should require less time for the completion of discovery than a larger, more complex dispute.[27] Time limits, however, could always be modified at the direction of the tribunal,[28] and failure to observe time limits should not risk vacatur of any award.[29]

COST ALLOCATION

Especially in "asymmetrical" disputes (where one side has a large volume of information, and the other relatively little), the temptation to "shoot for the moon" may be strong.[30] A party may demand broad categories of information, in hopes of imposing burdens that encourage settlement, or that (at very least) will greatly complicate the other side's preparation of the case. One obvious solution is to apply a financial disincentive, in the form of allocation of costs for discovery.[31] Perhaps the most radical allocation of costs rule would reverse the presumption that the party responding to discovery requests pays its own costs for producing the information, even if it prevails in the dispute.[32] A more limited rule might provide for a presumption that the requesting party will pay the costs of any discovery requested, or (at least) that the requesting party will pay if (ultimately) it loses the case,[33] or where the results in the case are not in line with the costs of the proceedings.[34] Another version of the rule might provide that, whenever a party requests information outside the scope of discovery applicable to its "track" (after case categorization), the presumption of "requesting party pays" would apply.[35] The tribunal would perhaps retain discretion not to apply the presumption (for good cause) as part of its award, but the in terrorem risk that unbridled discovery requests could come back to haunt the requesting party might well focus discovery processes on the highest-priority items.[36] The value of this "hard" approach is that it is self-implementing, as opposed to a system where a decision-maker must attempt (in determining whether a discovery request is proportional) to estimate the value of the claims at issue, the cost of the requested discovery, and the likelihood that the requested information will serve some purpose in resolving the dispute.[37]

LIMITING CATEGORIES OF INFORMATION

Information managers generally differentiate between "active," online and "near-line" information (generally the easiest information to retrieve) and backup information (stored for disaster recovery, rather than as a record-keeping practice), and deleted information (often, the hardest information to retrieve).[38] Requests for the latter categories of information tend to produce undue burden and cost (compared to preservation and

search of the easier categories). Thus, a discovery protocol could exclude the backup/deleted information categories altogether, or provide that requests for such information should only be granted if some heightened showing of need is provided (and, perhaps, if the requesting party pays the cost of such efforts).[39] Additional specific categories of information might be excluded, or at least subject to a presumption of exclusion,[40] subject to a high standard for showing clear relevance and materiality, versus the costs and burden of discovery.[41] Presumptively, moreover, sources of information excluded from search and production obligations would also be freed from a party's correlate obligation to preserve the information.[42]

Related to this approach is the use of "staged" discovery, wherein parties may be required to focus on one set of information (considered clearly relevant to the dispute) before they move on to less relevant sources or categories of information, or categories that are more burdensome to obtain, and search.[43] In general, the "staged" discovery approach is a "soft" tool, in that it requires assessment of the specifics of the case to determine which categories of information should be produced first.[44] But, a "hard" form could be established. Thus, for example, if specified categories of information were presumptively the first source of information in a dispute (see "Specified Categories of Information," below), the staging of discovery might depend upon a mandatory exchange of certain categories of information, before any further discovery would occur.[45] In the international arbitration context, the service of document requests might be delayed until after initial memorials of the parties (together with documents supportive of the memorials) have been exchanged.[46] In substance, using such techniques, the question becomes not so much how to limit expensive, burdensome discovery, but when (in the course of proceedings) to consider using such techniques.[47]

LIMITING PRESERVATION OBLIGATIONS

The duty to preserve evidence for use in litigation (or arbitration) generally derives from a common obligation to avoid "spoliation" of evidence.[48] That obligation generally applies in arbitration, as it does in litigation.[49] Determining when the duty to preserve attaches, the scope of document preservation, and the form of continued compliance obligations of attorneys and their clients is among the most difficult aspects of the discovery process.[50] The costs of preservation can be substantial, and parties and counsel often "over-preserve," as a result of concern that they may guess wrong as to the scope of their obligations.[51]

Perhaps the most extreme solution to this problem would be a flat rule that parties have no obligation to preserve evidence absent a specific written request from another party.[52] A more modest, but still firm, rule would provide that, except on a showing of bad faith, a party's use of its ordinary methods of record-keeping and archiving could not form the basis for a claim of spoliation. And arbitral rules might clarify that (absent bad faith), the ordinary form of remedy for failure to preserve information would be a (permissible, but not mandatory) "adverse inference" regarding the character of the information not preserved.[53]

SPECIFIED CATEGORIES OF INFORMATION

It is possible to designate specific categories of information that must (at least presumptively) be produced in a case. This is the approach embodied in Rule 26(a) of the Federal Rules of Civil Procedure.[54] The Rule 26(a) items are generic, meaning that they do not depend on the nature of the specific case. It is possible, however, to specify categories of information, for particular types of cases, that constitute the "core" of any disclosure, and which presumptively should be produced before parties undertake more detailed (and more expensive) discovery.[55] The Federal Circuit Advisory Council, for example, has prepared a "Model E-Discovery Order," for use in patent cases, which requires parties to exchange "core documentation" concerning "the patent, the accused product, the prior art, and the finances" of the patent and accused product before making any requests for emails.[56] The Model order also places presumptive limits on the number of custodians for which email must be searched, and limits on the number of email search terms. Requesting parties presumptively bear "all reasonable costs" for discovery in excess of these limits.

At the other end of the spectrum (in terms of claim amounts at issue, and sophistication of the parties), certain forms of cases may be channeled into strictly limited categories and volumes of discovery. Under a Local Rule in the Southern District of New York, for example, prisoner pro se cases are subject to a set of "standard" discovery requests, which the pro se plaintiff must use, absent "good cause."[57] Standard requests also exist for use in employment cases.[58]

A similar process for specification of information subject to discovery could be used in arbitration. A survey of disputes in a particular area might confirm that certain categories of documents and information routinely constitute the "core" of discovery in a particular field.[59] For example, construction disputes almost always involve: the principal contract and amendments, plans and specifications, change orders, records of job-site meetings and the like. Arbitrators might enhance the certainty of parties and counsel by stating, at the outset of proceedings, that these core documents should presumptively be exchanged between the parties.[60] In theory, moreover, the "core" list could be made mandatory (and restrictive), subject only to "good cause" exceptions.[61]

STREAMLINED SEARCH

As discussed above, the search for discovery materials could be confined to a fixed number of custodians, and a fixed number of locations (or types of media).[62] Beyond that, on the assumption that a responding party generally best knows its own technological capabilities, a tribunal may defer to the responding party's reasonable choices of search methods.[63] To avoid later disputes about the adequacy of search, however, the tribunal may mandate testing of search methodologies, to help facilitate agreement between the parties.[64] Further, a tribunal may require that a party claiming excessive results from too-broad search terms provide the requesting party with relatively detailed information about the search results.[65] The tribunal, in turn, may require that the parties "meet and confer" to discuss the results of the sample search, and attempt to agree on a more efficient search protocol.[66]

In addition, certain forms of software features have become increasingly common in ediscovery. One common feature, for example, is the use of de-duplication (and near-duplication) filters (which remove extra copies of the same document from a search population), and email "threading" (which eliminates the multiple copies of underlying emails, allowing review of only the "final" form of an email chain).[67] Many of these features could be authorized as presumptive elements of a search protocol.[68]

LIMITING USE OF DEPOSITIONS

Pre-hearing depositions are relatively rare in international arbitration, and some suggest that they have no place at all in arbitration.[69] And out-of-control deposition discovery could seriously undermine the efficiency of an arbitration process.[70] But an extreme no-deposition practice could have unintended consequences (lengthening a hearing where counsel confront a witness for whom they have no relevant documents or statements, to predict what they may say, and prepare for cross-examination).[71]

One alternative to depositions, used extensively in international arbitration, involves the preparation of witness statements, not just for experts, but for fact witnesses (at least to the extent that they are within the control of a party).[72] The rules of domestic arbitration-sponsoring organizations permit testimony in that form.[73] Use of the witness statement system can save hearing time, by limiting (if not eliminating) direct testimony of witnesses,[74] and by helping focus cross-examination on the witness' statement.[75] Because the witness statement confines the scope of the witness' testimony,[76] moreover, discovery (in the form of a witness deposition) may not be necessary.[77]

There are circumstances where some witnesses are not available to provide written statements, although they are available for hearing testimony, or where the "live" direct testimony of a witness may be essential (as where there are complicated facts to be explained to the tribunal); thus, an arbitrator should not require written statements where counsel elect not to use them.[78] But an arbitrator could (at least) require that parties consider (and "meet and confer" regarding) the use of witness statements. And an arbitrator could provide (at least presumptively) that any witness who provided a written statement would not be subject to deposition. Less formal methods of information-gathering, such as witness interviews, might also substitute for depositions.[79]

Additional methods of streamlining depositions include time limitations,[80] or the use of videoconferencing (to avoid travel costs, and increase scheduling flexibility),[81] and "staging" of depositions, to depose the most knowledgeable person first, or the conduct of a Rule 30(b)(6) representative deposition[82] (with the aim of determining whether, after limited depositions, there remains any reasonable need for additional deposition examination).[83] Here, again, an arbitrator (or an institution, as part of its guidelines) might require that parties at least consider imposing these kinds of limitations, even if such limitations are not expressly included in the parties' arbitration agreement.[84]

PRECLUSION FOR DELAY

A common remedy for failure to disclose requested information is an order of preclusion, to the effect that related information may not later be offered as evidence in a hearing.[85] The remedy, however, is often softened by a "harmless error" rule, allowing late production and use of evidence.[86] In the arbitration context, where speed and efficiency are at a premium, a harder version of the rule might obtain better results. Thus, for example, a party that failed to produce requested documents within the time periods set by the tribunal might simply be precluded from presenting such evidence.[87] Such preclusion, however, should be tied specifically to an order of the tribunal directing discovery, to avoid claims that the tribunal has somehow unfairly prohibited a party from making its case in arbitration.[88] Alternatively, as explained above, arbitrators might inform a recalcitrant party that the tribunal may apply an adverse inference, or allocate costs, if the party does not produce information as specifically directed by the tribunal.[89]

LIMITED PRIVILEGE REVIEW

Costs associated with review of documents for privilege, and the generation of related privilege logs, can be substantial.[90] The establishment, at the outset of a case, of less burdensome forms of privilege review and logging can help ensure that parties do not "over-designate" documents to be withheld from production, on grounds of privilege.[91] Further, the creation of presumptive (or mandatory) protocols for privilege review and logging can reduce the uncertainty parties may face in determining what their privilege protection obligations may be.[92]

Examples of protective orders and privilege protocols abound.[93] An arbitration sponsoring organization might offer one or more "standard" forms of protective orders. As a means to reduce the risks of inadvertent production of privileged information (and thus reduce the incentive to over-designate privileged documents), a standard form might incorporate a "claw-back" provision, such that no privilege waiver would occur from inadvertent production.[94] In addition, a standard form of privilege protection order might presumptively approve less burdensome forms of privilege logs, including "categorical" privilege listings, wherein categories of documents may be grouped, and privilege asserted on a group basis;[95] and email thread logging, where each uninterrupted email chain would constitute a single entry (versus individual logging of every part of a lengthy email chain).[96]

MANDATORY COOPERATION

The efficiency value of cooperation in discovery cannot be overstated.[97] When parties (and their counsel) cooperate, they may avoid mistakes in the production of information, more easily focus on information that matters most to resolution of the dispute, and (in many instances) reduce the cost of information exchange, through shared protocols and platforms for information processing.[98] As a "soft" tool, arbitrators certainly should encourage parties to cooperate in the discovery process. But backing up that approach, "hard" tools for enforcing an ethos of cooperation exist. One obvious requirement is an obligation to "meet and confer" (preferably, in advance of the first pre-hearing conference with the tribunal), to address topics related to the conduct of disclosure.[99] The obligation may be made even more specific. Parties may be required to fill out a form, confirming that they have discussed specific topics, and outlining the terms on which they have agreed, and what topics remain to be resolved by the tribunal. They might also be required to exchange initial discovery requests (as part of the "meet and confer" process), in order to facilitate discussion of discovery issues in the dispute.[100]

Further, when discovery disputes arise, during the course of pre-hearing proceedings, the tribunal again may require that parties "meet and confer" in an attempt to resolve the dispute, before raising the issue with the tribunal. Specification of an efficient process (such as short letters explaining the issue, followed by a swift telephone with the tribunal) may further reduce costs (as many disputes can be resolved quickly, with a minimum of submissions to the tribunal).[101]

Finally, in allocating the costs of arbitration, the degree of good faith cooperation of the parties may be an appropriate consideration. In egregious circumstances, sanctions for bad faith practices may be imposed.[102] The expectation of cooperation, and the potential consequences for parties and their counsel, should be clearly stated (for maximum in terrorem effect) from the outset of the arbitration process.

SINGLE ARBITRATOR FOR DISCOVERY MANAGEMENT

Three-arbitrator tribunals are expensive; and when all three arbitrators must participate in resolving

any discovery dispute, the cost of discovery can be inflated.[103] As a response, in three-arbitrator cases, the designation of the tribunal Chair (or another of the individual arbitrators) to rule on discovery disputes may be a simple, efficient method for reducing discovery costs.[104]

CONCLUSION: IMPLEMENTING "HARD" DISCOVERY CONTROLS

Arbitration is a "creature of contract;" the existence of an obligation to arbitrate, the scope of the matters to be arbitrated, and the procedures for arbitration—all are generally determined by agreement of the parties (and, often, by their choice of rules from an arbitration-sponsoring organization).[105] In advance of any dispute, at the time of entry into a transaction (which may include negotiation of dispute-resolution provisions) parties may be in the best position to discuss "hard" discovery control methods. After arbitration begins, parties may resist implementation of stringent discovery controls,[106] especially in circumstances where one party perceives an advantage from more lenient discovery rules.[107] Arbitrators, moreover, may hesitate to impose significant restraints,[108] for fear (unfounded or not)[109] of later claims that the award may be challenged on due process grounds.[110] And, in any event, arbitrators differ widely in their views of what an "ideal" form of arbitration should encompass.[111]

Yet, arbitration clauses are often silent on the question of discovery, and if they do speak to discovery issues, generally they invoke only a specific limit (such as a prohibition against interrogatories, or a limitation on the number of depositions allowed).[112] Indeed, in some instances, arbitration clauses go in the opposite direction, for example by adopting wholesale the Federal Rules of Civil Procedure (at least with regard to discovery).[113] Targeted, effective (and fair) forms of pre-litigation discovery cost control procedures are more than feasible.—they already exist.[114] Arbitration-sponsoring institutions could make such forms more widely available for use in arbitration by offering them as "model clauses" on their web-sites.[115] Sponsoring institutions and bar groups, moreover, could more widely promote such forms, through continuing education and other outreach programs.[116]

The model clause solution, however, cannot suffice to spark substantial change in the field of discovery efficiency improvements in arbitration.[117] Instead, real change requires arbitration-sponsoring institutions to modify their rules, to establish a presumption that cost-control measures will apply, absent express agreement of the parties, or ruling by the presiding tribunal for good cause.[118] One example of such a system appears in the ICDR Guidelines for Arbitrators Concerning Exchanges of Information.[119] The Guidelines, by their terms, became effective in "all international cases administered by the ICDR commenced after May 31, 2008," with the proviso that they would be incorporated into the next revision of the ICDR's International Arbitration Rules. The Guidelines further provided that they could be "adopted in arbitration clauses or by agreement at any time in any other arbitration administered by the AAA," the domestic sister to the ICDR.[120] The Guidelines stated that "[t]he parties may provide the tribunal with their views on the appropriate level of information exchange for each case," and that "[a]rbitrators should be receptive to creative solutions for achieving exchanges of information in ways that avoid costs and delay," but that "the tribunal retains final authority" to apply the Guidelines.

This form of guidance, committing the arbitration-sponsoring organization to the use of efficiency principles,[121] ensures that the organization's principles are not routinely derailed by parties and arbitrators that refuse to adopt efficiency protocols "recommended" (but not required) by the organization.[122] Further, careful drafting and review of the organization's principles may help ensure that the organization's rules are fair, and will withstand challenges on grounds of due process limitations,[123] or the inability of a party to present its case.[124]

For arbitration-sponsoring institutions that choose not to make "hard" tools for discovery efficiency a mandatory element of their rules, there remains the option of treating the discovery limitations as "presumptively" applicable (unless the parties expressly "opt out" of their application).[125] Alternatively, an institution might provide a general direction (broadly used in many of the protocols referenced in this Article), that arbitrators conduct proceedings in an efficient fashion, coupled with the recommendation that arbitrators and parties at least "consider" use of tools outlined in a guideline document.[126] Even with this non-mandatory form, a "hard" tool is available. Parties might stipulate (in their arbitration agreement), or the sponsoring organization might require (in its rules), that, as part of the development of a pre-hearing order (and preferably

in advance of the first conference with the tribunal), that the parties *must* "meet and confer" to discuss the issues outlined in the discovery guideline formulated by the organization, and *must* report to the tribunal on whether they will voluntarily "opt in" to one or more of the guideline tools. In effect, that form of guideline would mirror the Rule 26(f) requirements of the Federal Rules of Civil Procedure,[127] and build upon the preliminary hearing requirement common in many arbitration proceedings.[128] Sponsoring organizations might provide a checklist of discovery issues for discussion between the parties,[129] and with the tribunal, in connection with a preliminary conference.[130]

Whether the guidelines of a specific arbitration-sponsoring organization will include all of the elements outlined in this Article is very much a matter for discussion between all the constituents affected by rules changes (parties, counsel, arbitrators and the sponsoring organization itself). As with most matters of rules changes in arbitration, the process is likely to be iterative, as organizations experiment with specific changes, and gather feedback from their constituents. At a minimum, the development of proposed rule changes should spark dialogue, and may (at least) lead to heightened awareness of the importance of developing sound practices to balance fairness with efficiency in the arbitration process.

Notes

1 In the international arena, much of the criticism of discovery excesses relates to what has been called the "Americanization" of the international arbitration process. See Elena V. Helmer, "International Commercial Arbitration: Americanized, 'Civilized,' or Harmonized?, 19 Ohio St. J. on Dispute Resol. 35 (2003). This Article largely focuses on the domestic (American) context, but draws (in part) on experiences, rules and protocols in the international arbitration field.

2 Some have gone as far as to suggest that "arbitration is often not cheaper, faster or more predictable than litigation," and that arbitration is "often an inefficient method of dispute resolution." Aaron Foldenauer, "Big Risks and Disadvantages of Arbitration vs. Litigation," Corp. Counsel Mag. (July 29, 2014), available at https://www.law.com/corpcounsel/almID/1202665052210/?slreturn=20180803010238. There are also strong voices to the contrary. See Noah J. Hanft, "In Arbitration, Judge Thyself, Not The Process," Corp. Counsel Mag. (Oct. 3, 2014), available at https://www.cpradr.org/news-publications/articles/2014-10-03-in-arbitration-judge-thyself-not-the-process-corporate-counsel (suggesting that Foldenauer "arrives at the wrong conclusion," as litigation is also subject to "misuse and abuse," and noting that parties can "avoid a runaway process" by "shap[ing] a process that meets their needs"); see also William A. Dreier, "Alternative Dispute Resolution: Achieving The Promise Of Arbitration" (May 31, 2011), available at http://ccbjournal.com/articles/13947/alternative-dispute-resolution-achieving-promise-arbitration (suggesting that the substance of criticisms of arbitration costs and discovery abuses is "often anecdotal, and the problems at times magnified in the retelling," but "perceptions can be as damaging as reality in how parties approach the arbitration option"); Christopher Drahozal & Quentin R. Wittrock, "Is There A Flight From Arbitration?", 37 Hofstra L. Rev. 71, 73 (2008) ("reports—of dissatisfaction with the arbitration process leading to a 'flight from arbitration'—are not based on any systematic study;" the "evidence of flight consists largely of anecdotes"), available at https://scholarlycommons.law.hofstra.edu/hlr/vol37/iss1/3.

3 There are conflicting views on whether arbitration costs and burdens are justified by the need for a fair, accurate and flexible process, especially as arbitration has grown to encompass all manner of (often complex) disputes. See, e.g., Robert A. Merring, "Into The Briar Patch: Discovery In Arbitration," The Resolver at 18 (Winter 2017), available at http://www.fedbar.org/Image-Library/Sections-and-Divisions/ADR/2017-Fall-The-Resolver.aspx

(noting "explosive growth" of arbitration in "big stakes" matters, and suggesting that, "in such highly sophisticated fields as patent and reinsurance matters," it "borders on the absurd" to arbitrate unless there is "some modicum of prehearing discovery"); Jennifer Kirby, "Efficiency in International Arbitration: Whose Duty Is It?", 32 J. of Int'l Arb. 689, 691 (2015) (noting that "efficiency" in arbitration is not simply about time and cost, but about the quality of the process and results); Harout Jack Samra, "Is Arbitration All It's Cracked Up To Be?", Presentation at ABA Section of Litigation Annual Conference (Apr. 2012), available at https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac_2012/3-1_arbitration.authcheckdam.pdf (noting that arbitration values, including flexibility, cost efficiency, speedy outcomes, and fairness "are not entirely in line with one another, and in some cases may actually be inversely correlated. [T]o the extent that the parties determine that flexibility is a key value they seek from the arbitration process, they may sacrifice efficiency and suffer additional delays."); William W. Park, "Arbitrators And Accuracy," 1 J. of Int'l Dispute Settlement 25, 53 (2010), available at https://academic.oup.com/jids/article/1/1/25/879376

(suggesting that accuracy in arbitration awards should not be sacrificed for the sake of efficiency); Thomas J. Stipanowich, "Arbitration: The 'New Litigation'," 2010 U. Ill. L. Rev. 1, 6, available at https://www.illinoislawreview.org/wp-content/ilr-content/articles/2010/1/Stipanowich.pdf ("as arbitration has been called upon to assume the burden of resolving virtually every kind of civil dispute, it has taken on more and more features of a court trial").

4 See Brian S. Harvey, Speech (on making the most of your arbitration process), 8 J. Bus. & Tech. L 385, 388 (2013), available at https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1207&context=jbtl

(noting criticism that arbitration "all too often features full-blown discovery" that may become "too much like court litigation"); William K. Slate, "All Hands On Deck," Keynote Address to Orlando Neutrals Conference, Nov. 5, 2010, available at https://www.yumpu.com/en/document/view/16924351/keynote-address-by-william-k-slate-ii-president-and-ceo-orlando- (noting the reality of "creeping litigation" practices in arbitration, including uncontrolled discovery); NYSBA, Report by the Arbitration Committee of the Dispute Resolution Section, "Arbitration Discovery In Domestic Commercial Cases" (Apr. 2009), available at http://www.nysba.org/Sections/Dispute_Resolution/Dispute_Resolution_PDFs/ARBITRATION_DISCOVERY__IN_DOMESTIC_COMMERCIAL_CASES.html (hereinafter cited as "NYSBA Report"), available at www.nysba.org (noting "trend to inject into arbitration expensive elements that had traditionally been reserved for litigation," with discovery that has "spiraled out of control").

5 See Albert Bates, Jr., "Controlling Time and Cost in Arbitration: Actively Managing the Process and 'Right-Sizing' Discovery," 67 Disp. Resol. J. 313, 341 (2012) ("arbitrators have the authority and the obligation to be active managers of the arbitration process;" suggesting that "[w]hen the procedures requested by the parties threaten the efficient and cost-effective resolution of the matters to be decided in arbitration, arbitrators should intercede"); New York State Bar Association, "Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of Domestic Commercial Arbitrations," at 6 (2010) (hereinafter cited as the "NYSBA Guidelines"), available at https://www.adr.org/sites/default/files/document_repository/NYSBA%20Guidelines%20for%20the%20Arbitrator%27s%20Conduct.pdf (suggesting that the "key element" in arbitration management is the "good judgment of the arbitrator," because there is "no set of objective rules which, if followed, would result in one 'correct' approach"); John M. Barkett, "E-Discovery for Arbitrators," 1 Dispute Resol. Int'l 129, 168 (2007), available at https://heinonline.org/HOL/LandingPage?handle=hein.journals/disreint1&div=17&id=&page=

("A thoughtful tribunal may need no rules; common sense and a good sense of fairness might be enough to manage production of electronic documents that is going to be permitted by the tribunal.").

6 See College of Commercial Arbitrators, "Protocols for Expeditious, Cost-Effective Commercial Arbitration," at 72 (2010) (hereinafter cited as "CCA Protocols"), available at http://apps.americanbar.org/litigation/committees/corporate/docs/2011-cle-materials/10-Prevent-the-Runaway/10c-protocols-expeditious.pdf (suggesting that arbitrators should "work with counsel" to find ways to "limit or streamline discovery in a manner appropriate to the circumstances;" that they should "keep a close eye on the progress of discovery;" and "stay on top of the case"); Richard Chernick, "Arbitral Power: Confessions of a 'Managerial' Arbitrator" (2011), available at https://www.americanbar.org/content/dam/aba/events/dispute_resolution/Meeting_Materials_Arbitration_Clause.authcheckdam.pdf (referring to "managerial" arbitrator as one who will "collaborate with the parties in process design and assume the primary responsibility for managing the chosen process in order to achieve the parties' goal of an effective and efficient proceeding").

7 See Mitchell Marinello & Robert Matlin, "Muscular Arbitration and Arbitrators' Self Management Can Make Arbitration Faster and More Economical," 67 Disp. Resol. J. 69 (Nov. 2012-Jan. 2013), available at http://web.b.ebscohost.com/ehost/pdfviewer/pdfviewer?vid=0&sid=7dc6c299-6dbf-4876-9a86-8470735d9835%40sessionmgr101; Harvey J. Kirsh, "Muscular Arbitration" (Dec. 20, 2011), available at https://www.jamsadr.com/blog/2011/muscular-arbitration (noting need for arbitrators to "exert control over the parties to keep the process moving," through a "disciplined, 'muscular' process").

8 See Federal Judicial Center, "Benchbook for U.S. District Court Judges" at 189 (2013) (hereinafter cited as "FJC Benchbook"), available at https://www.fjc.gov/sites/default/files/2014/Benchbook-US-District-Judges-6TH-FJC-MAR-2013.pdf (noting that judge should be an "active case manager," to help avoid "disproportionate or unnecessary costs").

9 See Ronald J. Hedges, Barbara J. Rothstein & Elizabeth C. Wiggins, "Managing Discovery of Electronic Information" at 19 (2017) (hereinafter cited as "Hedges, Rothstein & Wiggins"), available at https://www.fjc.gov/sites/default/files/2017/Managing_Discovery_of_Electronic_Information_3d_ed.pdf

(noting factors affecting proportionality); see generally The Sedona Conference Commentary on Proportionality In Electronic Discovery, 14 Sedona Conf. J. 155 (2013) (hereinafter cited as the "Sedona Proportionality Commentary"), available at www.thesedonaconference.org (outlining principles for consideration in assessing proportionality of discovery).

10 See, e.g., AAA Commercial Rules, R-22(b)(iv) (giving arbitrator authority to "balance the need for production" of electronically stored information against "the cost of locating and producing" such information); R-23(b)-(c) (giving arbitrator authority to impose "reasonable search parameters" if parties are unable to agree, and to "allocate[e] costs of producing documentation").

11 See Steven C. Bennett, "E-Discovery: Reasonable Search, Proportionality, Cooperation, and Advancing Technology," 30 J. Marshall J. Info. Tech. & Privacy L. 433, 439 & n.25 (2014), available at https://repository.jmls.edu/cgi/viewcontent.cgi?article=1740&context=jitpl ("precise budgeting for [ediscovery] projects may be elusive, especially at the outset of litigation") (citing authorities); Hedges, Rothstein & Wiggins at 26 n.23 (noting variations in estimates of ediscovery costs, and the "need for a comprehensive empirical examination of the cost of e-discovery").

12 Craig B. Shaffer, "The 'Burdens' of Applying Proportionality," 16 Sedona Conf. J. 52, 122 (2015), available at http://iproinnovations.com/wp-content/uploads/2016/04/Shaffer-The-Burdens-of-Applying-Proportionality.pdf

(hereinafter cited as "Shaffer") ("disingenuous" to suggest that proportionality factors can be "easily applied in every case, particularly at the outset of the litigation").

13 See FJC Benchbook, Sec. 6.01 ("The parties exercise first-level control and are the principal managers of their cases[.]"). Assessment of proportionality factors, moreover, is far from an exact science. See Sedona Proportionality Commentary at 155 ("proportionate discovery is not defined by a 'perfect fit' and cannot be reduced to a simple quantitative formula"); id. at 163 (noting that it is often "difficult to evaluate the

importance of the requested information until it is actually produced").

14 See Lee H. Rosenthal & Steven Gensler, "From Rule Text to Reality: Achieving Proportionality in Practice," 99 Judicature 43, 44 (2015), available at https://judicialstudies.duke.edu/sites/default/files/centers/judicialstudies/judicature-99-3_gensler-rosenthal.pdf

("Lawyers and judges have had proportionality obligations since [Federal Rules changes in] 1983, but few lawyers or judges made proportionality a focus of discovery, and fewer still expressly invoked or applied the proportionality limits. Some academics and thoughtful judges have questioned whether proportionality is sufficiently defined or understood to achieve the stated goals."); Martha Dawson & Bree Kelly, "The Next Generation: Upgrading Proportionality for a New Paradigm, 82 Def. Counsel J. 434, 435, 437 (2015), available at http://www.lfcj.com/uploads/3/8/0/5/38050985/dawson_and_kelly_proportionality_iadc_defense_journal.pdf

(hereinafter cited as "Dawson & Kelly") (noting that "the principle of proportionality has long existed in the rules," but noting the "historical failure of proportionality to address the problems of discovery").

15 There is another sense in which general guidelines on cost control are part of the "soft law" of arbitration. See Thomas J. Stipanowich, "Soft Law in the Organization and General Conduct of Commercial Arbitration Proceedings," Chapter II in Lawrence W. Newman & Michael J. Radine (eds.), Soft Law In International Arbitration (JurisNet 2014) (hereinafter cited as "Stipanowich") (noting that procedural "[s]oft law plays an increasingly prominent role in evolving standards for organizing and conducting commercial arbitration proceedings").

16 See Dawson & Kelly at 445 ("A major component of the historical failure of courts to take proportionality into account rests upon the failure of parties to proactively employ and invoke the principle. . . . The assessment of proportionality in discovery should not be merely a reactionary process."). Even under recently revised Federal Rules of Civil Procedure, "[u]nless specific questions about proportionality are raised by a party or the judge, there is no need for the requesting party to make a showing of or about proportionality." Duke Law School Center for Judicial Studies, "Guidelines and Practices for Implementing the 2015 Discovery Amendments To Achieve Proportionality," 99 Judicature 50 (Winter 2015), available at https://www.ned.uscourts.gov/internetDocs/cle/2015-09/Guidelines-and-Practices-Sept.19.pdf (hereinafter cited as the "Duke Guidelines").

17 See Steven C. Bennett, "Tiered Discovery: An Efficient Proportionality Solution?", ABA Pretrial Practice & Discovery Newsletter (2018), available at https://www.americanbar.org/groups/litigation/committees/pretrial-practice-discovery/articles/2018/summer2018-tiered-discovery-an-efficient-proportionality-solution.html .

18 See www.cpradr.org/resource-center (hereinafter cited as the "CPR Protocol").

19 CPR also offers a model form of "Economical Litigation Agreement," meant to be incorporated into contracts between business partners, suppliers and others, at the start of a business relationship. See CPR Economical Litigation Agreement (2009) (hereinafter cited as the "CPR ELA"), available at https://www.cpradr.org/resource-center/toolkits/economical-litigation-agreement. This form of model agreement, like the CPR Protocol for arbitration, divides cases into various tracks (based on the size of the claims at issue), and applies varied discovery limitations to the specific tracks.

20 See, e.g., AAA Construction Industry Arbitration Rules (2015), available at (differentiating between "Fast Track" procedures (cases under $100,000); "Standard Track" procedures; and "Large, Complex" procedures (cases over $1 million)); AAA, Commercial Arbitration Rules and Mediation Procedures (2013), available at https://www.adr.org/sites/default/files/Construction%20Rules.pdf (differentiating between Expedited Procedures, which may include no discovery and a documents-only hearing, versus rules for Standard and Large, Complex disputes); JAMS Streamlined Arbitration Rules & Procedures (2014) (hereinafter cited as the "JAMS Streamlined Rules"), available at https://www.jamsadr.com/rules-streamlined-arbitration/ (discovery in cases involving claims smaller than $250,000 to be completed within two weeks after all pleadings exchanged).

21 Presumably, the cases for which absolutely no discovery would be appropriate would be relatively confined. See Thorpe at 5 ("[A]lthough it is important to limit discovery in a way to make the arbitration hearing cost-effective—in the end the most important goal is to have a fair hearing, and the achievement of that goal often requires some discovery tailored to the particular case.").

22 See JAMS Arbitration Discovery Protocols (2010) (hereinafter cited as "JAMS Protocols"), available at https://www.jamsadr.com/arbitration-discovery-protocols/ (Exhibit A, listing "relevant factors" to be considered in determining the appropriate scope of discovery, including "amount in controversy," "complexity of the factual issues," "number of parties and diversity of their interests," and more); see also Duke Guidelines at 51 (noting that an amount-in-controversy calculation "can change as the case progresses, the claims and defenses evolve, and the parties and judge learn more about the damages or the value of the equitable relief at issue).

23 C. Northcote Parkinson, "Parkinson's Law: Or, The Pursuit of Progress," The Economist (Nov. 19, 1955), available at www.economist.com/node/14116121.

24 See R. Wayne Thorpe, "Case Management and Cost Control for Commercial Arbitration," at 3 (2012) (hereinafter cited as "Thorpe"), available at https://www.jamsadr.com/publications/2012/case-management-and-cost-control-for-commercial-arbitration ("[A]s goes your home construction project, so goes your litigated dispute (whether in arbitration or the courts): *the longer it takes the more it costs.*") (emphasis in original).

25 See Sedona Proportionality Commentary at 159 ("Setting deadlines for substantial completion of discovery (or certain phases of discovery) can reduce incentives for a party to manipulate or inappropriately prolong the discovery process with burdensome requests or inappropriate objections."); FJC Benchbook at 197 ("Empirical data show that setting a firm trial date and sticking to it when possible is one of the best ways to ensure that the case moves forward without undue cost or delay.").

26 See CPR Protocol (rejecting the "leave no stone unturned" approach to discovery); CCA Protocols (encouraging arbitrators to "enforce contractual deadlines and timetables" in arbitration agreements); NYSBA Report (recommending that arbitrator "sets ambitious hearing dates and aggressive interim deadlines, which, the parties are told, will be strictly enforced"); see also Michael A. Doornweerd & Andrew F. Merrick, "Strategies For Controlling Discovery Costs In Commercial Arbitration," 12 ABA Commercial & Bus. Litig. 4 (2011), available at https://jenner.com/system/assets/publications/1692/original/CBL_Sum11_DoornweerdMerrick.pdf?1314629255

(suggesting that arbitrators set "a final hearing date as soon as possible," with "tight deadlines for completing discovery" and a requirement that "the parties strictly adhere to the deadlines").

27 See JAMS Streamlined Rules (setting very brief period for information exchange in smaller cases).

28 Such extensions, however, should not be routinely granted. See Neil M. Eiseman, John E. Bulman & R. Thomas Dunn, "A Tale Of Two Lawyers: How Arbitrators and Advocates Can Avoid the Dangerous Convergence of Arbitration and Litigation," 14 Cardozo J. Conflict Resol. 1, 25 (2013), available at https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac2013/sac_2013/62-4_a_table_of_two.authcheckdam.pdf ("productivity is achieved by making certain that the dates [set for a discovery cutoff, and other limitations] are firm and will *not* be modified absent authorization by the arbitrator, even in the event of an agreement to extend by the parties") (emphasis in original); id. at n.71 (arbitrators should enforce deadlines except in circumstances "clearly beyond the contemplation of the parties when the time limits were established") (quotation omitted).

29 See John H. Wilkinson, "Arbitration Contract Clauses" (2010), available at https://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/wilkinson.html (contract should include a provision that arbitrators are empowered to modify limitations "upon a clear and compelling showing of good cause," and that failure to meet deadlines will not render an award invalid, but arbitrators "may impose appropriate sanctions and draw appropriate adverse inferences against the party primarily responsible for the failure to meet any such deadlines").

30 See Alison A. Grounds & Kenneth C. Gibbs, "An Arbitrator's Guide To Successfully Resolving eDiscovery Disputes" at 2 (Spr. 2013) (hereinafter cited as "Grounds & Gibbs"), available at https://www.americanbar.org/content/dam/aba/events/dispute_resolution/Arbitrator_Guide_To_Successfully_Resolving_eDiscovery_Disputes.authcheckdam.pdf ("Most eDiscovery disputes arise in asymmetrical cases where one party has more ESI than the other."); John M. Barkett, "More on the Ethics Of E-Discovery: Predictive Coding and Other Forms of Computer-Assisted Review" at 35 n.83 (2013), available at https://judicialstudies.duke.edu/sites/default/files/centers/judicialstudies/TAR_conference/Panel_5-Original_Paper.pdf (noting that discovery disputes may arise in "the asymmetric case ([with] a data-poor party against a data-rich party trying to take advantage of the disparity)," or in "the disproportionate case (where, irrespective of data, the amount or issues in controversy are too small in relation to e-discovery costs").

31 See John M. Barkett, "What Are the Best Ways To Control the Cost of Arbitration Without Compromising the Fairness of the Process?" in Arbitration: Hot Questions, Cool Answers (2015) available at https://www.shb.com/~/media/files/professionals/barkettjohn/arbitrationhotquestionscoolanswers.pdf ("Arbitrators can also use allocation of costs to encourage efficiency in the conduct of proceedings and to control inappropriate conduct."); John J. Jablonski & Alexander R. Dahl, "The 2015 Amendments to the Federal Rules of Civil Procedure: Guide to Proportionality in Discovery and Implementing a Safe Harbor for Preservation," 82 Def. Counsel J. 411 (Oct. 2015), available at https://us.eversheds-sutherland.com/portalresource/lookup/poid/Z1tOl9NPluKPtDNlqLMRV56Pab6TfzcRXncKbDtRr9tObDdEnW3EnW3!/fileUpload.name=/The%202015%20Amendments%20to%20the%20Federal%20Rules%20of%20Civil%20Procedure.pdf ("allocation of costs is a key mechanism by which courts and lawyers can focus discovery on information that is most important to the parties' claims and defenses"); see also McPeek v. Ashcroft, 202 F.R.D. 31, 34 (D.D.C. 2001) (noting that, where party requesting burdensome information must pay the costs of discovery "the requesting party literally gets what it pays for").

32 See generally Steven C. Bennett, "An Update on Recovery of E-Discovery Costs by a Prevailing Party," 30:4 Computer & Internet Lawyer 26 (2013); Steven C. Bennett, "Are E-Discovery Costs Recoverable By A Prevailing Party?", 20:3 Albany Law J. of Sci. & Technol. 537 (2010) available at, http://www.albanylawjournal.org/Documents/Articles/20.3.537-Bennett.pdf.

33 See International Chamber of Commerce, "Techniques for Managing Electronic Document Production When it Is Permitted or Required in International Arbitration" (2012), available at https://cdn.iccwbo.org/content/uploads/sites/3/2016/10/ICC-Arbitration-Commission-Report-on-Managing-E-Document-Production-2012.pdf (hereinafter cited as "ICC Techniques"), suggesting that cost shifting should be reserved for "extraordinary circumstances and imposed only after a weighing of the relevant factors").

34 See Nicolas Ulmer, "Some Cost Consensus," (May 5, 2011), available at http://arbitrationblog.kluwerarbitration.com/2011/05/04/some-cost-consensus/ (noting use of "instant cost" orders and "sealed offer" cost allocations—wherein costs are taxed if a sealed offer in settlement exceeds the result obtained—as means to discourage "unnecessary applications, disclosure requests or plain violations of the rules in arbitration").

35 See CPR Protocol ("If extraordinary circumstances justify production of [information disproportionate to the dispute], the tribunal shall condition disclosure on the requesting party's paying to the requested party the reasonable costs of a disclosure."); "ICDR Guidelines for Arbitrators Concerning Exchanges of Information," document available through Internet search of title (tribunal may "condition granting" of a request on "the payment of part or all of the cost by the party seeking the information," and may "allocate the costs of providing information among the parties, either in an interim order or in an award"); Chartered Institute of Arbitrators,

"Protocol for E-Disclosure in Arbitration" (2008) (hereinafter cited as "Chartered Institute Protocol"), available at https://www.ciarb.org/docs/default-source/practice-guidelines-protocols-and-rules/e-discolusure-in-arbitration.pdf?sfvrsn=2 ("The Tribunal shall consider the appropriate allocation of costs in making an order or direction for e-disclosure.").

36 See Doug Jones, "Using Costs Orders To Control The Expense Of International Commercial Arbitration," Roebuck Lecture (June 9, 2016), available at https://www.ciarb.org/docs/default-source/practice-guidelines-protocols-and-rules/e-discolusure-in-arbitration.pdf?sfvrsn=2 (suggesting that parties and the tribunal should discuss, at an "early" case management conference, the basis on which cost orders will be made, with the aim of sending a "deterrent" message, such that parties and counsel will "think twice" about process excesses, and the tribunal may encourage "sensibly efficient party conduct which will, by extension, minimize the time and cost of an arbitration"); David Howell, "Developments in Electronic Disclosure in International Arbitration," 3 Disp. Resol. Int'l 151 (2009), document available through Internet search of title (suggesting "judicious used of cost shifting" as an "effective means of controlling requests for electronic disclosure," with "the ultimate decision on where such costs will ultimately lie being reserved for the final award on costs").

37 See, e.g., Oracle America, Inc. v. Google Inc., 2015 WL 7775243 (N.D. Cal. Dec. 3, 2015) (both parties failed to provide sufficient information, such that court was required to apply its "best judgment based on limited information" about the proportionality of discovery requests).

38 See generally "The Sedona Conference Glossary: E-Discovery & Digital Information Management" (4th ed. 2014), available at http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=79055.

39 See CPR Protocol ("Requests for back-up tapes, or fragmented or deleted files should only be granted if the requesting party can demonstrate a reasonable likelihood that files were deliberately destroyed or altered by a party in anticipation of litigation or arbitration and outside of that party's document-retention policies operated in good faith."); Chartered Institute Protocol ("The primary source of disclosure of electronic documents should be reasonably accessible data; namely, active data, near-line data or offline data on disks. In the absence of particular justification it will normally not be appropriate to order the restoration of back-up tapes; erased, damaged or fragmented data; archived data or data routinely deleted in the normal course of business operations."); NYSBA Report (recommending that discovery be produced "only from sources used in the ordinary course of business"); see also Duke Guidelines at 54 (giving examples of discovery sources that may be too burdensome to search, including: "information stored using outdate or 'legacy' technology, or information stored for disaster recovery rather than archival purposes that would not be searchable or even usable without significant effort").

40 See CPR ELA (excluding from search and production "backup tapes," "legacy data from obsolete systems," "[m]etadata or slack space," "[e]lectronic information residing on PDAs, Smartphones and instant messaging systems," and "[v]oicemail systems").

41 See Elizabeth J. Shampnoi, "The Promise of the Process: Ways To Capture the Promised Benefits of Arbitration" (Spring 2014), available at www.aaau.org ("setting forth a high standard by which the arbitrator may grant additional discovery should suffice to allay" concerns about restrictions on discovery imposed "prior to knowing the specifics of the dispute").

42 See Sedona Proportionality Commentary at 151 (noting that "aggressive preservation efforts can be extremely costly, and parties (including government parties) may have limited staff and resources to devote to those efforts") (quotation omitted).

43 See Hedges, Rothstein & Wiggins at 21 (suggesting that judge "encourage the lawyers to stage the discovery by first searching for the ESI associated with the most critical or key players, examining the results of that search, and using those results to refine subsequent searches;" and suggesting that parties "first sort through the information that can be obtained from easily accessed sources and then determine whether it is necessary to search the less accessible sources"); Sedona Proportionality Commentary at 157 (same); Duke Guidelines at 57 (suggesting focus of discovery initially on "the subjects and sources that are most clearly proportional to the needs of the cases," and using the results of that discovery to "guide decisions about further discovery"); see also Thorpe at 6 (suggesting arbitration process where parties "exchange significant documents, perhaps answer a few interrogatories and take one or two party depositions—and then STOP, take another deep breath, and then evaluate carefully what remains to be done").

44 Parties might agree, and the decision-maker might direct, that initial discovery be directed to information essential to aid the process of settlement, or mediation. See Shaffer at 117.

45 A related method is "tiering," in which the scope of discovery varies, depending on the source of information. See Laporte & Redgrave at 50 n.110 (suggesting, as an example, that discovery from "key player" custodians might be broader in scope than from other sources). Also related is the concept of sampling, wherein parties conduct limited searching, to determine the likely size and cost of a more complete form of search. See Jeff Johnson, "The Proportionality Triangle: A Strategic Model for Negotiating E-Discovery," 4 ABA E-Discovery & Dig. Evid. Comte. J. 4 (Winter 2013), available at http://ccbjournal.com/articles/21754/proportionality-triangle-strategic-model-negotiating-proportional-e-discovery-respons (suggesting that parties should make only "phased commitments," in circumstances where they lack "solid experience," to assess how many documents they would have to review in a complete search, before actually agreeing to produce the documents).

46 See ICC Techniques (suggesting that, with such a system, "[r]equests [for documents] can be confined to specific factual issues that are raised in the memorials and on which there are gaps in the documentary evidence already submitted").

47 See Scott A. Moss, "Litigation Discovery Cannot Be Optimal, But Could Be Better," 58 Duke L.J. 889 (2009), available at https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1392&context=dlj (explaining value of sequencing techniques in improved efficiency).

48 See generally "The Sedona Conference Commentary on Legal Holds: The Trigger and the Process," 11 Sedona Conf.

J. 265 (2010), available at https://www.acc.com/chapters/ncr/upload/Handout-2010-Commentary-on-Legal-Holds.pdf.

49 See generally Steven A. Hammond, "Spoliation in International Arbitration: Is It Time To Reconsider the 'Dirty Wars' of the International Arbitral Process?", 3 Dispute Resol. Int'l 5 (2009) at (noting that the integrity of the arbitration process depends on preservation of essential evidence).

50 See Rick H. Rosenblum & McLean Jordan, "Electronic Discovery and Reinsurance Arbitration: An Update," 15 Arias Quarterly 1 (2008).

51 See Rand/Institute For Civil Justice, "Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery" at 91 (2012) (hereinafter cited as the "Rand Study"), available at www.rand.org (noting that, with "few reliable benchmarks" for "assessing the risk of employing a particular preservation strategy," company representatives often take a "relatively conservative" approach to preservation); Sherman Kahn, "E-Discovery Demystified for Arbitrators—Tips for How To Manage E-Discovery for Efficient Proceedings," 5 NYSBA New York Dispute Resol. L. 32, 34 (Spring 2012) ("One of the main drivers of increased e-discovery cost in litigation is fear by parties and their counsel that they will be accused of spoliation.").

52 Jay Brudz & Jonathan M. Redgrave, "Using Contract Terms To Get ahead of Prospective eDiscovery Costs and Burdens in Commercial Litigation," 18 Richmond J. of L. & Tech. 13, Paras. 11-12 (2012), available at http://jolt.richmond.edu/jolt-archive/v18i4/article13.pdf (hereinafter cited as "Brudz & Redgrave") (provision "has the obvious benefit of eliminating the guesswork surrounding the trigger of preservation duties").

53 See "IBA Rules on the Taking of Evidence in International Arbitration" (2010), available by Internet search of title (Article 9.5: "If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of the Party."); Chartered Institute Protocol (Article 14: permitting adverse inference from failure to produce evidence); UNCITRAL "Notes On Organizing Arbitral Proceedings," Para. 51 (2012), available at https://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-e.pdf ("The arbitral tribunal may wish to establish time-limits for the production of documents. The parties might be reminded that, if the requested party duly invited to produce documentary evidence fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal is free to draw its conclusions from the failure and may make the award on the evidence before it.").

54 See Fed. R. Civ. P. 26(a) (requiring disclosure of identifying information for each individual "likely to have discoverable information" that the disclosing party "may use to supports its claims or defenses;" copies "or a description by category and location" of "all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support is claims or defenses, unless the use would be solely for impeachment;" and computations of damages and insurance information).

55 See Elizabeth D. Laporte & Jonathan M. Redgrave, "A Practical Guide To Achieving Proportionality under New Federal Rule of Civil Procedure 26," 9 Fed. Cts. L. Rev. 19, 50 n.110 (2015), available at http://redgravellp.com/sites/default/files/Laporte-Redgrave_Final_Publication_Vol_9_Issue2vii.pdf (hereinafter cited as "Laporte & Redgrave") ("Core discovery will virtually always be proportional.").

56 See Federal Circuit Advisory Council, "Model E-Discovery Order," available at http://www.cafc.uscourts.gov/sites/default/files/announcements/Ediscovery_Model_Order.pdf.

57 See Local Civil Rules for the Southern District of New York, Rule 33.2(e), available at http://www.nysd.uscourts.gov/rules/rules-2018-08-01.pdf.

58 See Federal Judicial Center, "Report on Pilot Project Regarding Initial Discovery Protocols for Employment Cases Alleging Adverse Action" (2011), available at https://www.fjc.gov/sites/default/files/2012/DiscEmpl.pdf (intent of employment protocols is to "encourage parties and their counsel to exchange the most relevant information and documents early in the case, to assist in framing the issues to be resolved and to plan for more efficient and targeted discovery").

59 See Ariana Tadler, "APB To Requesting Parties: Prepare For Proportionality," Practical Law at 31 (Dec. 2015/Jan. 2016), available at https://milberg.com/wp-content/uploads/2018/01/AJT-Prepare-for-Proportionality.pdf ("Perhaps, in time, protocols for certain early core discovery, such as those used in employment cases, will become the norm in most types of cases; however, these consensus-driven protocols do not currently exist."); Duke Guidelines at 58 (noting employment discovery protocols "used effectively in courts around the country," and suggesting that "[i]t is expected that work will be undertaken to develop similar subject-specific discovery protocols for other practice areas").

60 See generally Michael E. Schneider, "A Civil Law Perspective: 'Forget E-Discovery'," Chapter 2 in David. J. Howell (ed.) "Electronic Disclosure In International Arbitration" (2008) ("In contractual disputes, the primary evidence is the contract and the exchanges between the parties. Normally, both parties to the contract will have this evidence in their possession and will not need discovery orders by a court or arbitral tribunal.").

61 The standard for exceptions, beyond "core" materials, could be made even more restrictive. See M. Scott Donahey, "Get Back—Return Arbitration to its Roots," 32 Alt. High Cost Litig. 117, 118 (2014), available at http://www.scottdonahey.com/wp-content/uploads/2015/03/ReturnArbitrationtoitsADRRoots.pdf (noting that the "return on the investment" of discovery is often "very small," and suggesting that arbitration discovery could be limited, in some cases, to materials "that can be shown to be 'absolutely essential to the presentation of a party's case'"); "JAMS Efficiency Guidelines for The Pre-Hearing Phase Of International Arbitrations" (Feb. 1, 2011), available at https://www.jamsadr.com/international-arbitration-guidelines/ (suggesting that document requests "should be limited to documents that are directly relevant to significant issues in the case, or to the case's outcome").

62 To a large extent, the cost of retrieval and review may depend upon the number of custodian accounts reviewed, and the

volume of information in those accounts. See generally Rand Study (noting that "typical" ediscovery matter costs approximately $18,000 per Gigabyte retrieved and reviewed, and each custodian typically has 5-20 Gigabytes of information subject to review). Any effort to reduce the scope of accounts searched could yield cost savings. See NYSBA Guidelines at 31 ("Narrowing the time fields, search terms and files to be searched, as well as testing for burden are some of the tools for controlling e-discovery that should be considered.").

63 See Sedona Proportionality Commentary at 174-75.

64 See id. at 175 (preliminary searches "may help the parties agree on cooperative discovery efforts and potentially yield savings by, for example, eliminating the need for some searches or date ranges, identifying custodians, or refining search terms to more effectively target and retrieve relevant information"); see also Irene C. Warshauer, "Electronic Discovery," 2 FINRA Neutral Corner 1 (2011), available at http://www.finra.org/sites/default/files/Publication/p123535.pdf (suggesting that parties should "test the search terms and time frames" of proposed searches to avoid unnecessary cost to repeat or conduct additional searches); Deborah Rothman & Thomas J. Brewer, "ADR Technology Survey Indicates Case Management Issues and Arbitration E-Discovery Problems Are Spreading, Growing More Expensive" (2010), available at http://www.nadn.org/articles/RothmanDeb-EDiscoveryArticle(June2010).pdf ("sampling" of results of searches has "particular merit" as means to "test the utility of replicating the limited sample searches more broadly").

65 See Sedona Proportionality Commentary at 167-68 ("[I]f a party claims that a search would result in too many documents, the party should run the search and be prepared to provide the opposing party with the number of hits and any other applicable qualitative metrics. If the party claims that the search results in too many irrelevant hits, the party may consider providing a description or examples of irrelevant documents captured by the search. Quantitative metrics in support of a burden and expense argument may include the projected volume of potentially responsive documents. It may also encompass the costs associated with processing, performing data analytics, and review, taking into consideration the anticipated rate of review and reviewer costs, based upon reasonable fees and expenses.").

66 See "Vasudevan Software, Inc. v. MicroStrategy, Inc.," 2012 WL 5637611 (N.D. Cal. Nov. 15, 2012) (requiring parties to confer regarding search term hit counts for each custodian and term used in sample search).

67 See Sedona Conference Commentary "On Defense of Process: Principles and Guidelines for Developing and Implementing a Sound E-Discovery Process" (Sept. 2016), available at https://thesedonaconference.org, (describing ediscovery "culling" techniques).

68 A variety of additional practices could be established as presumptively reasonable elements of ediscovery. See, e.g., NYSBA Report at 17 ("In practice, it is common for parties to produce certain ESI in native file format along with image files (such as TIFF or PDF) and searchable text, along with searchable metadata fields. For example, metadata relating to the date, the author, the recipient, and other aspects of the information may be produced by both parties.").

69 See Albert Bates, Jr. & R. Zachary Torres-Fowler, "Expectations and Practices Concerning Examinations in International Arbitration," Legal Intelligencer (Jan. 15, 2018) (hereinafter cited as "Bates & Torres-Fowler"), available at www.law.com (describing depositions as a "peculiar U.S.-centric discovery device that rarely assists the tribunal").

70 See NYSBA Guidelines at 14 ("If not carefully regulated, deposition discovery in arbitration can get out of control and become extremely expensive, wasteful and time-consuming.").

71 See Thorpe at 5 ("[I]t is not productive to eliminate all discovery, and then double or triple the length of the final hearing while counsel inefficiently bumble through deposition-like questioning of witnesses they have never seen or heard from before."); Richard Chernick & Zela Claiborne, "Reimagining Arbitration," 37 Litig. 32, 37 (Summer 2011) ("Taking some depositions may save hearing time. Experienced arbitrators know that listening to an attorney examine a witness extensively can be a poor use of hearing time."); NYSBA Guidelines at 14 ("[A]t times, the absence of any depositions in a complex arbitration can significantly lengthen the cross-examination of key witnesses and unnecessarily extend the completion of the hearing on the merits. So too, a limited deposition in advance of document requests might serve to focus and restrict the scope of document discovery and/or reduce the risk that the other party is hiding relevant evidence.").

72 See Raymond G. Bender, "Presenting Witness Testimony in U.S. Domestic Arbitration: Should Written Witness Statements Become The Norm?", 69 Disp. Resol. J. 39 (2014) (hereinafter cited as "Bender") ("The direct testimony of fact witnesses in international arbitration is routinely presented in written rather than oral form.").

73 See JAMS Rules, R-22(e) ("The arbitrator may in his or her discretion consider witnesses affidavits or other recorded testimony even if the other Parties have not had the opportunity to cross-examine, but will give that evidence only such weight as he or she deems appropriate."); AAA Rules, R-35(a) ("At a date agreed upon by the parties or ordered by the arbitrator, the parties shall give written notice for any witness or expert witness who has provided a witness statement to appear in person at the arbitration hearing for examination. If such notice is given, and the witness fails to appear, the arbitrator may disregard the written witness statement and/or expert report of the witness or make such other order as the arbitrator may consider to be just and reasonable.").

74 See Bates & Torres-Fowler (as used in international arbitration, where a witness has given a written statement, "direct examinations are exceedingly rare," and generally consist of introducing the witness, confirming the authenticity of the statement, and responding to any new factual developments; such direct examinations "typically last only a few minutes").

75 See Bender at 49 ("Knowing what a witness' testimony will be in advance of the hearing obviously provides an opportunity to prepare effectively for cross-examination. Witness statements avoid surprise at the hearing and eliminate requests for more time to prepare for cross-examination,

or to review the transcript for that purpose, again creating efficiencies at the hearing.").

76 See Oleg Rivkin, "Contrasting U.S. Litigation and International Arbitration," 40 Litig. 59, 62 (2013) ("As a rule, an arbitral tribunal will not admit into evidence at the hearing any testimony of witnesses under the control of a party that was not contained in a witness statement and submitted as one of the sequential memorials.").

77 See Nathan O'Malley, "Are Depositions Incompatible with International Arbitration?" (Nov. 19, 2012), available at http://arbitrationblog.kluwerarbitration.com ("Considering the predominant practice in international arbitration of using written witness statements, and the exchange of rebuttal witness statements, the need to conduct a pre-hearing cross-examination of a witness in order to establish his or her testimony is arguably absent."); Bender at 50 ("[A] written witness statement can be an important fact-finding tool which, to some extent, can serve as a substitute for a deposition if exchanged early enough in the proceedings."); Nicolas Ulmer, "The Witness Statement as Disclosure" (Dec. 2014), available at www.mediate.com (witness statements are a means of "disclosure to adverse counsel and the Tribunal of what the witness knows and has to say about the issues in the case").

78 See Bender at 55. A separate problem arises where a witness provides a written statement, and then becomes unavailable for cross-examination at a hearing. In such circumstances, the tribunal will typically ignore the written statement, absent a valid reason for absence (such as severe illness). See Ragnar Harbst, "Disregarding Witness Statements? Why Arbitrators Cannot Unring the Bell" (July 6, 2015), available at https://globalarbitrationnews.com.

79 See Philip E. Cutler, "I Am Your Arbitrator: Here Is What To Expect from Me . . . And What I Expect from You," 70 Disp. Resol. J. 15, 26 (2015) (suggesting use of interviews, in lieu of depositions, "when appropriate"); James Hope, "Witness Statements: The Cost of Gilding The Lily" (June 17, 2014), available at www.cdr-news.com (suggesting use of "witness summaries," instead of witness statements, as a mean to save the cost of full statements).

80 See Josh Leavitt et al., "Drafting an Arbitration Clause That Works" (Oct. 2015), available at www.americanbar.org (suggesting need to establish "clear boundaries regarding the number and duration of depositions" to avoid a "time-consuming, expensive and unpleasant discovery process").

81 See Robert J. Jossen, Matthew L. Mazur & Michael J. Sullivan, "Taking a Targeted Approach to Arbitration Discovery," N.Y.L.J., Nov. 28, 2016, available at www.alm.com.

82 Under Rule 30(b)(6) of the Federal Rules of Civil Procedure, a party in federal litigation may name a corporation or other institution as the deponent, and state with "reasonable particularity," the subjects on which a person, designated by the institution or corporation, will be required to testify. That process could be adapted to the arbitration context.

83 See Stephen J. O'Neil, "Managing Depositions in Arbitration To Minimize Cost and Maximize Value," 69 Disp. Resol. J. 15, 20-22 (2014).

84 Other means of persuasion may also exist. See William A. Dreier, Interview, "A Firm Exponent of ADR" (July/Aug. 2013), available at www.ccbjournal.com (suggesting process where, when counsel refuses to reduce use of depositions, arbitrator requests a "written statement from the client to the effect that the arbitrator is willing to proceed with fewer depositions to hold down the cost, but that the client wishes his attorney to engage more witnesses and depositions;" noting that "[s]ometimes attorneys back down").

85 See Fed. R. Civ. P. 37(c)(1) ("If a party fails to provide information . . . the party is not allowed to use that information . . . to supply evidence on a motion, at a hearing, or at trial, unless the failure was substantially justified or is harmless."); see also 1993 Advisory Committee Notes ("This automatic sanction provides a strong inducement for disclosure of material that the disclosing party would expect to use as evidence[.]").

86 See Southern Union Co. v. Southwest Gas Corp., 180 F. Supp.2d 1021 (D. Ariz. 2002) (harmless error where production could take place months before trial, movant had time to re-depose experts, and respondent ordered to pay movant's costs).

87 See CPR Protocol ("Except for the purpose of impeaching the testimony of witnesses, the tribunal should not permit a party to use in support of its case, at a hearing or otherwise, documents or electronic information unless the party has presented them as part of its case or previously disclosed them. But the tribunal should not permit a party to withhold information otherwise requested to be disclosed on the basis that the documents will be used by it for the impeachment of another party's witnesses.").

88 See Glen Rauch Sec., Inc. v. Weinraub, 768 N.Y.S.2d 611 (N.Y. App. Div. 2003) (arbitrators properly sanction party for failure to comply with their order directing production of documents by precluding the testimony of a witness and the introduction of evidence to which the undisclosed documents related).

89 See National Cas. Co. v. First State Ins. Grp., 430 F.3d 492, 497, 499 (1st Cir. 2005) (party was "offered a choice between producing documents or having to contend with an adverse inference about their content;" this choice was "within the arbitrator's power to offer"); NYSBA Guidelines at 12 (suggesting that "tools" to ensure cooperation in discovery include "making of adverse factual inferences against a party that has refused to come forward with required evidentiary materials on an important issue, the preclusion of proof, and/or the allocation of costs").

90 See Grounds & Gibbs at 5; see also Gideon Mark, "Federal Discovery Stays," 45 U. Mich. J.L. Reform 405, 420 (2012) ("Attorney review for privilege and the preparation of privilege logs constitute the single most costly steps in the e-discovery process."); John M. Barkett, "Practice Focus: The Duty of Candor, Inadvertent Production of Documents, and Your Arbitration Work," 36 Alternatives to the High Cost of Litig. 51 (Apr. 2018) (outlining burdens of privilege protection in the context of arbitration).

91 See Robert Owen & Greg Kaufman, Managing the Risks of eDiscovery: A Q&A with Bob Owen and Greg Kaufman, Partnering Perspectives (Fall 2011) («One of the most distressing aspects of eDiscovery is that there are really no bright-line tests to establish whether a document is privileged or not. The economics of document review

requires that reviews be done by junior people. You are not going to pay $600 an hour for a partner to be doing privilege review-at least as a first pass-and the junior people are not at all motivated to take chances in their designations so they will inevitably over-designate."); Philip J. Favro, Inviting Scrutiny: How Technologies Are Eroding The Attorney-Client Privilege, 20 Richmond J.L. & Tech. 2, Para. 151 (2014) (listing methods to reduce privilege log burdens).

92 See Kyle C. Bisceglie, "LexisNexis Practice Guide: New York e-Discovery and Evidence," Sec. 8.21 (2014) (hereinafter cited as "Bisceglie") (codifying privilege review practices avoids problems where parties have "conflicting views" on how privilege issues should be handled).

93 See, e.g., ARIAS U.S., Sample Form 3.3: Confidentiality Agreement, available at www.arias-us.org.

94 See Federal Circuit Advisory Council, Model E-Discovery Order, available at www.cafc.uscourts.gov (providing that, "[p]ursuant to Federal Rule of Evidence 502(d), the inadvertent production of privileged or work product protected ESI is not a waiver in the pending case or in any other federal or state proceeding."). Rule 502(d) of the Federal Rules of Evidence does not apply in arbitration proceedings, where there is no federal judge to order the privilege protection, but (at very least) an arbitrator-approved protective order, including a claw-back provision, would confirm the intention of parties to avoid privilege waiver due to inadvertent disclosures. See Irene C. Warshauer, "Electronic Discovery in Arbitration: Privilege Issues and Spoliation of Evidence," 61 Disp. Resol. J. 9, 11 (Jan. 2007) (suggesting that, "[s]hould the question arise in a subsequent proceeding, the decision maker, whether another arbitration panel or a court, is much more likely to respect the privilege if the arbitration panel has entered an order approving a claw-back agreement"); see generally The Sedona Principles on Protection of Privileged ESI, 17 Sedona Conf. J. 99 (2016) (Principle 2 on use of claw-back orders).

95 See John Facciola & Jonathan Redgrave, "Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework," 4 Fed. Cts. L. Rev. 19, 53 (2010) («By limiting the documents that must be indexed or logged, by using categories to organize the information, and by using detailed logs only when necessary, the cost of claiming and adjudicating privilege claims can be greatly reduced.»); FJC Benchbook at 196 ("By reducing the risk of waiver, the [clawback] order removes one reason parties conduct exhaustive and expensive preproduction [privilege] review.").

96 See Bisceglie (noting New York Commercial Division Rule 11-b, providing for single entry log of email chain).

97 See Dawson & Kelly at 446 ("Cooperation to establish an appropriate scope of discovery *by agreement* is the gold standard for ensuring proportional discovery in any case.") (emphasis in original).

98 See generally The Sedona Conference Cooperation Proclamation (2008), available at www.thesedonaconference.org; David J. Waxse, "Cooperation—What Is It And Why Do It?", 18 Richmond J. L. & Tech. 8 (2012).

99 See NYSBA Guidelines at 7 (suggesting that parties meet, "[i]f at all possible," for an "early, formative discussion about discovery"). This "meet and confer" process is required under the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 26(f) (outlining topics to be discussed prior to first pre-trial conference with the court); see also Chartered Institute Protocol (providing that "parties should confer at the earliest opportunity regarding the preservation and disclosure of electronically stored information and seek to agree the scope and methods of production"); id. (listing additional matters for "early consideration").

100 See Sedona Proportionality Commentary at 160 (noting new Rule 26(d)(2) of the Federal Rules of Civil Procedure, which permits parties to propound document requests, before their initial meeting, which "allows time for meaningful good faith discussions regarding discovery and facilitates discussion of the proportionality factors" in the case). One value of the "meet and confer" process is to ensure that counsel educate themselves about their client's information storage practices and capabilities, in order to facilitate formulation of proportional discovery requests, and (where necessary) to inform the decision-maker of the contours of any discovery disagreements presented for resolution. See Richard Posell, "E-Discovery In Arbitration" (May 2010), available at www.mediate.com/articles/posellR1.cfm (noting that, at early stages of an arbitration, counsel often lack a detailed understanding of their clients' systems and technical problems inherent in responding to discovery requests, and suggesting that an arbitrator order counsel to "meet and confer").

101 See JAMS Protocols ("Lengthy briefs on discovery matters should be avoided. In most cases, a prompt discussion or submission of brief letters will sufficiently inform the arbitrator with regard to the issues to be decided."); CCA Protocols (arbitrators should be available on "fairly short notice" to hold a conference call with the parties to resolve procedural, process or scheduling issues); see also Duke Guidelines at 56 (suggesting establishment of procedures "to enable the parties to engage the judge promptly and efficiently when necessary" to resolve discovery disputes); id. at 59 ("A live pre-motion conference is often an effective way to promptly, efficiently, and fairly resolve a discovery dispute.").

102 See Steven C. Bennett, "Who Is Responsible for Ethical Behavior By Counsel in Arbitration?", Chapter 25 in AAA Handbook On Arbitration Practice (2010); see also CPR ELA (in ruling on attorney's fee associated with discovery disputes, arbitration "shall consider whether any counsel engaged in lack of civility or professional courtesy").

103 See "Streamlined Three-Arbitrator Panel Option for Large Complex Cases," available at http://go.adr.org/Streamlined_Panel_Option.html. "The AAA has found that a three-arbitrator panel can actually cost five times as much as a single arbitrator. By maximizing the use of a *single* arbitrator, the parties will be able to capitalize on the cost savings provided by a single arbitrator, while still preserving their right to have the case ultimately decided by a panel of three arbitrators.") (explaining options under new program, to use single arbitrator for preliminary and discovery phases of a case).

104 See NYSBA Report (choice of single arbitrator to decide discovery issues can "avert scheduling difficulties and avoid the expense and delay of three people separately engaging in the laborious tasks related to resolving discovery issues").

105 See George E. Lieberman, "Discovery in an Arbitration Proceeding and Appealing an Award under the Federal Arbitration Act," 56 Fed. Law. 54, 55 (May 2009) ("[A]rbitration is a matter of contract. Consequently, the parties may contract to provide for expansive discovery (written discovery and depositions), limited discovery (restricted written discovery and depositions or no discovery. . . . When drafting an arbitration agreement, it would be wise to determine what discovery your client wants or needs and then employ the appropriate language in the agreement."); see generally Steven C. Bennett, "Conflicts Between Arbitration Agreements and Arbitration Rules," 15 Cardozo J. Conflict Resol. 221 (2013).

106 Joerg Risse, "Ten Drastic Proposals for Saving Time and Costs in Arbitral Proceedings," 29 Arb. Int'l 453, 454 (2013) (noting the often "overwhelming" fear that "if the case is ultimately lost, there will be complaints that not everything has been tried to win the case at hand," resulting in "insistence on a full-fledged arbitration"); David W. Rivkin & Samantha J. Rowe, "The Role of the Tribunal in Controlling Arbitral Costs," 81 Arb. 116, 123 (2015) (suggesting that parties are often "their own worst enemies" in agreeing to cost-saving procedures once an arbitration has been filed; "[n]either party wants to make 'concessions' to the other, even where a proposed procedure may seem both reasonable and efficient").

107 See Stipanowich ("[F]or a number of reasons users do not or cannot avail themselves of the choices available in arbitration. . . . Standard institutional arbitration procedures, designed to be flexible enough for a wide spectrum of disputes, often tend to afford considerable wiggle room for tactical delay and disruption by recalcitrant parties and counsel."); Jonathan W. Fitch, "The Limitations on American-Style Discovery In International Arbitration," Chapter 6 in Strategies For International Arbitration (2012) (hereinafter cited as "Fitch") ("If the parties to a commercial agreement postpone consideration of the issue of permissible discovery until the international arbitration case is filed and its dimensions are known, they may well then disagree as to what mechanisms best suit their needs."); see also Nicholas J. Boyle & Richard A. Olderman, "Securing the Benefits of Arbitration: Thoughtful Drafting Of Arbitration Clauses," 139 Corp. L. & Accountability Rep. 1 (July 20, 2016), available at www.wc.com (noting importance of parties agreeing to discovery limits in advance of arbitration).

108 See Cher Seat Devey, Electronic Discovery/Disclosure: From Litigation to International Commercial Arbitration, 74 Arbitration 369, 382 (2008) (hereineafter cited as "Devey") ("Arbitrators are reluctant to use the broad authority vested by almost all arbitration rules, in particular to regulate and conduct the proceeding efficiently.").

109 See Tracey B. Frisch, Death By Discovery, Delay, and Disempowerment: Legal Authority for Arbitrators To Provide a Cost-Effective and Expeditious Process, 17 Cardozo J. Conflict Resol. 155, 156 (2015) ("Courts have confirmed awards so long as the arbitrator's refusal to hear evidence or deny discovery requests did not deprive the party of a fundamentally fair hearing."); David E. Robbins, "Calling All Arbitrators: Reclaim Control of the Arbitration Process—The Courts Let You," 60 Disp. Resol. J. 9 (2005) (suggesting that some arbitrators need a "backbone transplant," and summarizing case law for the proposition that the fear of vacatur due to streamlined arbitration proceedings is "unfounded"); NYSBA Guidelines at 11 ("Some arbitrators tend to grant extensive discovery out of concern that any other approach might lead to a vacated award under Section 10 [of the FAA].") (disagreeing with view that discovery limits risk vacatur, as "greatly overstated").

110 See Tom Aldrich, "Arbitration's E-Discovery Conundrum" (Dec. 16, 2008), available at www.cpradr.org ("Recent experience . . . has shown that arbitrators are reluctant to deny or limit discovery when confronted with trial counsel used to the breadth of discovery under Rule 26 [of the Federal Rules]. Moreover, the threat of overturning an award or not being selected for a future case weighs heavily and has resulted in many arbitrators expanding the scope of prehearing discovery to more closely resemble that prevalent in the federal courts."); Fitch, Chapter 6 ("In the worst case scenario, a party that is aggrieved by the outcome of a discovery dispute might contest the enforcement of the arbitral award, arguing that the discovery mechanism used in the arbitration was unfair and did not allow for a full and just presentation of its case.").

111 See George Gluck, "Great Expectations: Meeting the Challenge of a New Arbitration Paradigm," 23 Am. Rev. Int'l Arb. 231, 232-33 (2012) (noting that "there is no universally recognized arbitral model" among arbitrators, and that "encouraging arbitrators simply to be more assertive and to focus primarily on 'time and costs,' without more," may compound the problem, by "touting efficiency without presenting a clear alternative procedural model").

112 See Gilda R. Turitz, "Managing Discovery In Arbitration" (Winter 2013), available at www.americanbar.org.

113 See Charles Moxley, Jr., "Discovery in Commercial Arbitration: How Arbitrators Think," 63 Disp. Resol. J. 36-40 (Aug.-Oct. 2008) ("Occasionally the parties provide in their arbitration clause that the federal or state rules of procedure shall apply to discovery in arbitration, resulting essentially in pseudo-litigation before a private judge."); Kenneth C. Gibbs & Barbara Reeves Neal, "It's Time To Fix Arbitration Discovery," 32 L.A. Law. 48 (Jan. 2010) (recommending strongly against the practice of adopting court rules of procedure in an arbitration clause); John Wilkinson, "Arbitration Discovery: Getting It Right," 21 Disp. Resol. Mag. 4, 5 (Fall 2014) ("Occasionally, both sides come to the first preliminary conference in agreement that there will be comprehensive discovery in accordance with the Federal Rules of Civil Procedure. . . . I recommend that the arbitrator make a concerted effort to dissuade the parties from following the Federal Rules[.]").

114 See Brudz & Redgrave at Para. 3 (suggesting that "much of the uncertainty, excess costs, and burdens related to electronic discovery in the world of commercial litigation can be obviated through the mutual adoption and ratification of terms conscribing the scope of discovery in the event of a dispute that would be the subject of arbitration or litigation"); id. at Para. 51 (providing sample contract terms); see also CPR Economical Litigation Agreement, available at www.cpradr.org; Donald R. Philbin, Jr., "Litigators Needed To Advise Transaction Lawyers on Litigation Prenups," 56 The Advocate 36, 47 (Fall 2011) ("Choosing arbitration is no longer the end of the inquiry. . . . [P]arties can tailor procedures to business goals and priorities—almost like choosing lunch items off of

a menu. Contract drafters now have the option of how much discovery they want[.]").

115 See Thomas J. Stipanowich, "Arbitration and Choice: Taking Charge of the 'New Litigation' (Symposium Keynote Presentation)," 7 DePaul Bus. & Com. L.J. 383, 386 (2009) ("[P]rocess choice is an illusion in the absence of appropriate alternative models from arbitration provider institutions. Clients and counsel tend to have neither the time nor the expertise to craft their own process templates, and usually need straightforward, dependable guidance from those that develop and administer the procedures upon which they rely.").

116 See Curtis E. von Kann, "A Report Card on the Quality of Commercial Arbitration: Assessing and Improving Delivery of the Benefits Customers Seek," 7 DePaul Bus. & Com. L.J. 499, 517 (2009) (hereinafter cited as "von Kann") (calling for "education of transactional attorneys and business persons concerning the adverse consequences of not detailing [the arbitration process], before disputes arise").

117 See Kent B. Scott & Adam T. Mow, "Creating an Economical and Efficient Arbitration Process is Everyone's Business," 67 Disp. Resol. J. 36, 39 (Aug.-Oct. 2012) (noting that "businesses too often give little or no thought to the dispute resolution provisions they put in their contracts," such that the provisions are "often considered to be mere boilerplate," and may be "copied from one agreement and pasted at the end of another").

118 Hiro N. Aragaki, "Arbitration: Creature of Contract, Pillar of Procedure," 8 Yearbook on Arb. & Mediation 2, 12 & n.62 (2016) (suggesting that "nudging" by arbitration-sponsoring organizations, in the form of "procedural models or templates" might produce "better informed, more effective, and therefore more desirable outcomes than what the parties could orchestrate on their own"); Edna Sussman, "Why Arbitrate? The Benefits And Savings," NYSBAJ 20, 22 (Oct. 2009), available at https://sussmanadr.com/why-arbitrate ("The selection of appropriate governing rules can make all the difference and can set up the time limits and other procedures desired.").

119 The ICDR Guidelines are available at www.apps.adr.org.

120 The norm, in international arbitration, is that there will be "far less pre-hearing disclosure" than is "typically" encountered in domestic (American) arbitration. NYSBA Guidelines at 23. In particular, beyond the exchange of documents on which the parties intend to rely, "there is a strong presumption against Pre-Hearing Disclosure which in any way approaches the scope of discovery which one might expect in a case which is litigation in a U.S. court." Id. at 24.

121 Consistent with the use of "expedited," "standard" and "complex" distinctions, increasingly offered in arbitration rules (and discussed above), the application of efficiency principles could vary, depending on the "track" assigned to a case. See von Kann at 517-19 ("At a minimum three templates should be available: one providing for a very expansive arbitration process, one for a very restrictive process, and one for something in between.").

122 See Roger Haydock, "Making Arbitration Work: The Keys to Efficient Resolution of Complex Civil Cases," Corp. Counsel Bus. J. (June 1, 2007), available at www.ccbjournal.com ("[P]arties need not draft discovery parameters from scratch into their arbitration provisions. The better approach is to invoke arbitration rules that impose reasonable limitations on discovery.").

123 For a useful comparison, consider the American Arbitration Association "Consumer Due Process Protocol Statement of Principles," available at www.adr.org, the product of extensive study, developed in cooperation with "representatives from government agencies, consumer interest groups, education institutions, and business," designed to ensure "evenhandedness in the administration of consumer-disputes resolution." See id.

124 See John Beechey, "The ICDR Guidelines for Information Exchanges in International Arbitration: An Important Addition to the Arbitral Toolkit," Chapter 21 in AAA/ICDR Handbook on International Arbitration Practice (2010) ("These procedures are intended to avoid objections and challenges based upon an alleged failure to respect due process[.]").

125 See Giacomo Rojas Elgueta, "Understanding Discovery in International Commercial Arbitration through Behavioral Law and Economics: A Journey Inside the Minds of Parties and Arbitrators," 16 Harv. Negot. L. Rev. 165, 188 (2011) (suggesting that "opt-in" approach to discovery limitations "has been shown to be ineffective," and that an "opt-out" strategy would "better serve the effectiveness and economy of arbitration," by providing that, "in the absence of any agreement to the contrary, these rules would be mandatory for both the parties and the tribunal").

126 See Thomas J. Stipanowich & Zachary P. Ulrich, "Commercial Arbitration and Settlement: Empirical Insights into the Roles Arbitrators Play," 6 Yearbook on Arb. & Mediation 1, 12 (2014) (noting that ICC and CCA guidelines on cost-effective arbitration have "resonated with many arbitrators and users of arbitration," and have "influenced evolving practices"). Such guideline documents, at a minimum, help to decrease the uncertainty parties face, in determining their disclosure obligations in arbitration. See generally Angela Eubanks Galloway, "Comparing International Arbitration Rules: A Movement towards Delocalization of Evidentiary Procedure," 16 Int'l Law Q. 1, 27 (Fall 2000) (suggesting that it is "imperative" that there exist "some uniform standard" for rules related to discovery and evidence).

127 Rule 26(f) of the Federal Rules provides that parties "must" confer, in advance of the first conference with the court, and develop a "discovery plan," which states the views of the parties on a host of specific issues, including: "the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues[.]" The Rule includes a requirement that the parties (and counsel) attempt, "in good faith," to agree on a discovery plan.

128 See, e.g., AAA Commercial Rule P-1 ("In all but the simplest cases, holding a preliminary hearing as early in the process as possible will help the parties and the arbitrator organize the proceeding in a manner that will maximize efficiency and economy, and will provide each party a fair opportunity to present its case."); Rule P-2 (providing a "checklist" of suggested subjects that the parties and arbitrator should address at the preliminary hearing, including "whether the

parties will exchange documents, including electronically stored documents, on which they intend to rely in the arbitration, and/or make written requests for production of documents within defined parameters," and "whether to establish any additional procedures to obtain information that is relevant and material to the outcome of disputed issues"); JAMS Comprehensive Rules, R-16 (providing for preliminary conferences, at the request of a party, or at the direction of the arbitrator, to discuss, among other things: "exchange of information," and a "schedule for discovery").

129 See Irene Welser & Giovanni De Berti, "Best Practices In Arbitration: A Selection of Established and Possible Future Best Practices" at 79, in Klausegger et al., eds, Austrian Arbitration Yearbook (2010) (best practice guidelines, can "serve as a form of 'checklist' for parties of what to expect from efficient proceedings," and may thus "increase the predictability of arbitration"), available at www.chsh.com/fileadmin/docs/publications/Welser/Beitrag_Welser_2010.pdf.

130 An organization might also develop a form of "model" discovery order, including potential terms that the parties and counsel could review, as part of their "meet and confer" process, with the aim of producing an order form that could be submitted to the tribunal for approval, during or after the initial conference with the tribunal. Alternatively, an organization might make reference to a checklist, or set of guidelines, of another organization. See Devey at 377-78 (suggesting use of preliminary hearings, at least in "complex" arbitrations, and referencing UNCITRAL document on organizing arbitral proceedings, as well as guidance from the Sedona Conference on principles for the conduct of efficient discovery).